

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1 – SUBREGION 34

COMMUNITY HEALTH SERVICES, INC.

and

AMERICAN FEDERATION OF TEACHERS, CT

Cases 01-CA-191633

February 27, 2019

COMMUNITY HEALTH SERVICES, INC.'S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Community Health Services, Inc. (hereinafter referred to as "CHS") files these exceptions to the decision of the Administrative Law Judge ("ALJ") issued on January 31, 2019 in the above captioned case. The bases for these exceptions are addressed in CHS's Brief in Support of Exceptions.

The Club objects to the following findings and conclusions:

1. The ALJ's finding that the testimony of Bell and Hermanson "fails to establish that either Hermanson or Bell understood their conversation to amount to bargaining about the discipline." (ALJD p. 11, lines 43-45, n. 13).

2. The ALJ's finding that "Bell framed the January 10 meeting as one where she and Hermanson 'met to discuss potential discipline for Dirgni Baker,' even though the record does not support a finding consistent with that characterization, that Bell was willing to talk about Baker's discipline at that time, or that she engaged in any bargaining at the January 10 meeting." (ALJD p. 14, lines 14-17).

3. The ALJ's finding that "I reject the Respondent's argument that the decision was shown to have been a collaboration between Bell and Howley, which is inconsistent with Bell's repeated statements that it was Howley's decision, not hers, and inconsistent with the preponderance of the record evidence. Although at one point Bell agreed that the decision was collaborative, this is only after leading questions and is not consistent with the totality of her testimony." (ALJD p. 15, lines 37-41).

4. The ALJ's decision to apply *Total Security Management*, 364 NLRN No. 106 (2016) when that case was wrongly decided by the NLRB and should be reversed. (ALJD p. 16, lines 3-20 and *passim*).

5. The ALJ's conclusion that "[t]o the extent the Board described limitations on the nature or extent of the bargaining obligation at the pre-discipline stage in *Total Security Management*, those limitations must be considered within the basic tenets of Section 8(a)(5) and Section 8(d) that require that bargaining be entered into in good faith." (ALJD p. 16, lines 40-44).

6. The ALJ's conclusion that CHS's was obligated under *Total Security Management* to bargain with the Union before placing Ms. Baker on a paid suspension. (ALJD p. 17, lines 23-46 and p. 18, lines 1-24)

7. The ALJ's characterization of Ms. Baker's conduct as "an allegation that she made a snippy comment to a co-worker, or otherwise engaged in a minor communication indiscretion that management deemed unprofessional or rude" without taking into account the long history of misconduct and management efforts at addressing such behavior that preceded the event. (ALJD p. 18, lines 8-11).

8. The ALJ's finding that "some evidence was presented by the General Counsel suggesting that individuals were not disciplined as harshly, despite their infractions and behavior seeming to be more severe than Bakers (sic.)" without noting the long history of misconduct and management efforts at addressing such behavior that preceded the event and the absence of such history with regard to any comparators. (ALJD p. 18, lines 13-15).

9. The ALJ's finding that "sending Baker home on January 3, and putting her in paid, administrative leave status on January 4, were steps taken toward the predetermined discharge. Therefore the Respondent began the process of discharging Baker on January 3, completing it on January 18. Labeling this action a paid suspension pending investigation on January 4 does not change the reality of Howley's decision." (ALJD p. 18, lines 16-20).

10. The ALJ's finding that "Even if the suspension was not shown to be a ruse to bolster the decision to discharge and did not demonstrate that the decision to discharge and the imposition of the discharge began on January 3, however, I would find that the Respondent failed to give notice and opportunity to bargain about the discharge before January 18." (ALJD p. 18, Lines 33-36).

11. The ALJ's finding that the January 4 documentation placing Ms. Baker on administrative leave "pending further investigation into this matter" "does not provide the Union with prior notice or opportunity to bargain about Baker's discharge." (ALJD p. 18, lines 43-45).

12. The ALJ's finding that "there was really no investigation left to do" and "the memo is misleading to the Union and evidences the Respondent's bad faith" without acknowledging the large disciplinary and counseling history concerning Ms. Baker and the need to assess and evaluate such history. (ALJD p. 19, lines 1-4).

13. The ALJ's characterization of the January 4 memo as failing to give the Union proper notice under *Total Security*, in particular the conclusion that "by stating that it was still investigating, the Respondent nullifies any suggestion that this memo served as notice and opportunity to bargain about proposed discipline of Baker." (ALJD p. 19, lines 18-34).

14. The ALJ's finding that "Bell rejected Hermanson's attempts to begin engaging in preliminary bargaining by dodging his suggestions of providing Baker with training or an EAP referral, if discipline were called for." (ALJD p. 19, Lines 37-39).

15. The ALJ's finding that "[i]t, therefore, cannot meet the Respondent's obligation to give the union prior notice and opportunity to bargain about proposed serious discipline. Just physically being in the room with Hermanson, in the absence of the Union having been told it was meeting to bargain over serious discipline, does not take the place of engaging in sincere, preimposition bargaining as required by *Total Security*." (ALJD p. 19, lines 41-45).

16. The ALJ's finding that "the Janaury 10 meeting failed to constitute prior notice and opportunity to bargain about Baker's discharge." (ALJD p. 20, lines 7-8).

17. The ALJ's finding that Bell misled the Union in the period from January 10 until January 18. (ALJD p. 20, lines 15-24).

18. The ALJ's conclusion that "based on Respondent's unilateral actions, the Union was in a greatly weakened position from which to bargain. The filing of the underlying charge in this case, and the Union's demands to bargain, provide ample support for the Union's continued interest in pursuing its right to bargain about Baker's discipline. When presented with a fait accompli, the Union was not required to go through the motions of bargaining, having already experienced the respondent's unlawful failure to bargain." (ALJD p. 20, lines 34-40).

19. The ALJ's conclusion that "Respondent's actions constituted unlawful, bad-faith bargaining, because they reflect an absence of any genuine intent to reach agreement with the Union, but instead demonstrate a purposeful circumvention of its obligation to bargain with the Union." (ALJD p. 20, lines 43-45).

20. The ALJ's conclusion that "Any limits to the Respondent's bargaining obligation referred to in *Total Security Mgmt.*, above, do not disturb the fundamental doctrine set forth in Section 8(a)(5) and 8(d) requiring that bargaining be done in good faith, which includes the requirement that bargaining be entered into with a sincere intent to try to reach a mutually agreeable resolution." (ALJD p. 20, lines 45-46 and page 21, lines 1-3).

21. The ALJ's conclusion that "both the investigation and the subsequent 'meeting' with the Union were charades, demonstrating a complete absence of any intent to engage with the Union regarding the substance of the purported conduct (or performance) issue Baker was accused of." (ALJD p. 21, lines 3-6).

22. The ALJ's conclusion that "[w]hether the real reason for the discharge was anti-union animus, or some other reason, lawful or unlawful, the Respondent has failed to demonstrate on this record what the real reason was, and therefore, the Respondent has failed to show that the discharge was for cause." (ALJD p. 21, lines 27-29).

23. The ALJ's finding that "Respondent has failed to establish that Baker was fired for cause within the meaning of Section 10(c) of the Act." (ALJD p. 21 lines 31-32).

24. The ALJ's allocation of the burden of proof on the Section 10(c) issue of "cause" on the Respondent. (ALJD p. 21, lines, 10-13, 27-29, 31-32, 34-39 and page 22, lines 1-6).

25. The ALJ's complete failure to find that Baker had engaged in repeated misconduct from June 2015, the last instance of which was the January 3, 2017 incident. (Not contained in ALJD).

26. The ALJ's failure to make a finding that on the undisputed evidence that in June, 2015, a manager informed Ms. Howley that a patient had complained to her that Ms. Baker had been rude to a receptionist, Rosie Pagan; that Ms. Baker had snapped at Ms. Pagan stating "look at my face" while circling her hands around her face. (Not contained in ALJD).

27. The ALJ's failure to make a finding based on the undisputed evidence that in 2015 Ms. Howley also personally observed Ms. Baker snap at a patient and make a summoning gesture, and that Ms. Howley personally spoke with Ms. Baker and explained that she needed to be more professional and to have a better tone with her co-workers. (Not contained in ALJD).

28. The ALJ's failure to make a finding based on the undisputed evidence that Shortly after she began at CHS in May, 2015, Ms. Howley emphasized to employees that they

should not use cell phones in the clinical area; that in early July, 2015, Ms. Howley had a specific conversation with Ms. Baker reminding her not to use her cell phone in the clinical area; that on July 14, 2015, Ms. Howley observed Ms. Baker several times using her cell phone in the clinical area; and that Ms. Howley issued Ms. Baker a formal warning for that infraction. (Not contained in ALJD).

29. The ALJ's failure to make a finding based on the undisputed evidence that in September, 2015, Ms. Baker was rude to a co-worker in the manner in which she complained about the co-worker transferring a call; that Ms. Howley observed Ms. Baker being excessively distracting to staff; that on October 1, 2015, Ms. Howley observed Ms. Baker using her cell phone in a clinical area; and that Ms. Howley issued Ms. Baker another formal warning for this behavior. (Not contained in ALJD).

30. The ALJ's failure to make a finding based on the undisputed evidence that in the first three months of 2016, Ms. Baker repeated much of the same misconduct and that because of communication issues with the provider with whom Ms. Baker was working, CHS reassigned Ms. Baker to another provider. (Not contained in ALJD).

31. The ALJ's failure to make a finding based on the undisputed evidence that Ms. Howley met several times with Ms. Baker in the beginning of 2016 to address her performance issues. (Not contained in ALJD).

32. The ALJ's failure to make a finding based on the undisputed evidence that on March 8, 2016, Ms. Baker rudely yelled at a co-worker, Maria Guzman, which Ms. Guzman confirmed at the hearing. (Not contained in ALJD).

33. The ALJ's failure to make a finding based on the undisputed evidence that Ms. Howley issued Ms. Baker a "Notice of Final Warning" that once again made clear what was expected of her and how she had been failing to meet expectations. (Not contained in ALJD).

34. The ALJ's failure to make a finding based on the undisputed evidence that in March, 2016, Ms. Baker was rude to another co-worker, Kemauli Brown, that Mr. Brown informed Ms. Howley of the incident, and that Ms. Howley discussed it with Ms. Baker. (Not contained in ALJD).

35. The ALJ's failure to make a finding based on the undisputed evidence that in June, 2016, Ms. Baker had a dispute with another co-worker, Angelita Capo; that Ms. Howley attempted again to work with Ms. Baker to improve her behavior and interactions with co-workers; and that Ms. Howley and Ms. Ashman, the Medical Assistant Supervisor, ran four "Team Building" sessions with Ms. Baker and Ms. Capo to improve inter-personal relations. (Not contained in ALJD).

36. The ALJ's failure to make a finding based on the undisputed evidence that In October, 2016, Ms. Baker had another negative interaction with yet another co-worker, Nicoll Rodriguez, in which that Ms. Baker grabbed Ms. Rodriguez' arm as Ms. Rodriguez attempted to assist Ms. Baker in finding a patient; and that Ms. Rodriguez was so upset about the interaction that she cried. (Not contained in ALJD).

37. The ALJ's conclusion that the limited comparative discipline evidence on this record establishes that the Respondent has never discharged an employee under similar circumstances as Baker's and has retained employees who exhibited arguably more serious behavior." ALJD p. 21, fn 15 lines 1-3).

38. The ALJ's conclusion that "Baker's own history of discipline further reveals that her series of infractions were not sufficient to remove her before the admittedly minor incident on January 3." (ALJD p. 21, fn 15, lines 3-6).

39. The ALJ's conclusion that "the Union's failure to respond to this [March 30, 2016] e-mail does not toll the backpay period. When presented with a fait accompli, the Union is not required to engage in bargaining about the unilateral change until the status quo ante has been restored." (ALJD p. 24, lines 23-30).

40. The ALJ's conclusion that "[b]y failing to provide the Union with notice and opportunity to bargain before implementing serious discipline of discharge of employee Baker on January 3, 2017, effective January 18, 2017, and by failing to bargain in good faith with the Union about Baker's discipline, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act." (ALJD p. 26, lines 23-27).

41. The ALJ's proposed remedy of reinstatement and backpay. (ALJD p. 27, lines 7-33).

42. The ALJ's proposed remedy that Respondent "expunge from its files any and all references to the discharge of Dirgni Baker, and notify her in writing that this has been done and that evidence of this unlawful action will not be used against him [sic.] in any way." (ALJD p. 27, lines 19-21).

43. The ALJ's proposed Order (p. 28, lines 1-46 and p. 29, lines 1-46).

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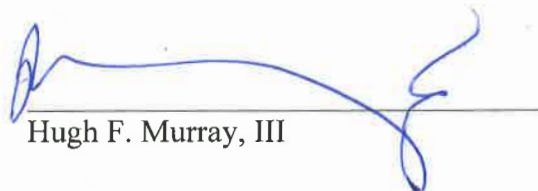
CERTIFICATE OF SERVICE OF: RESPONDENT'S BRIEF

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